IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

TUESDAY, THE 9TH JANUARY 2007 / 19TH PAUSHA 1928

CRL.A.No. 1379 of 2006(C)

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CRA.139/2001 of I ADDL. SESSIONS COURT, THIRUVANANTHAPURAM
SC.454/2000 of II ADDL. ASSISTANT SESSIONS COURT, THIRUVANANTHAPURAM

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APPELLANT:

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RAJENDRAN S/O.VISWANATHAN,
C.NO.619, CENTRAL PRISON, POOJAPURA,
THIRUVANANTHAPURAM.

BY ADV. ADV.LATHA PRABHAKARAN(STATE BRIEF)

RESPONDENT:

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THE STATE OF KERALA,
REPRESENTED BY A PUBLIC PROSECUTOR.

BY PUBLIC PROSECUTOR SRI.C.M.NAZAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 09/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.Thankappan, J.

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Crl. A. No. 1379 of 2006

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Dated this the 9th day of January,2007

JUDMENT

First accused in S.C.No.434/2000 on the file of the Court of the II Addl. Assistant Sessions Judge, Thiruvananthapuram is the appellant. The appellant and 2nd accused faced trial for offences punishable under section 55(a) of the Abkari Act. The brief facts of the case as follows:-

> "On 17-4-1999 at about 10.30 A.M. while PW4 was conducting patrol duty along with his party and when they reached at Killippalam, they found petitioner and the 2nd accused running away from the place on seeing the police party and the petitioner was holding a two litre can and the 2nd accused was holding a bottle having a capacity of 750 ml. and they chased and on examining the cannas and bottle contained arrack.

On the side of the prosecution, PW1 to PW5 were examined and Exts.P1 to P4 were marked. Material Objects MO1 and MO2 were also marked on the side of the prosecution. On the side of the defence, Ext.D1 was marked. After closing the evidence, the appellant and 2nd accused were questioned under section 313 Cr.P.C. They denied the prosecution allegation and stated that the police had foisted the case against them due to previous enmity. Relying on the prosecution evidence, the trial court found the appellant and the 2nd accused guilty under section 55(a) of the Abkari Act and they were

convicted thereunder and sentenced to undergo rigorous imprisonment for four years each and to pay a fine of Rs.1,00,000/- each and in default to undergo rigorous imprisonment for one year more each. Aggrieved by the above conviction and sentence, the appellant and the 2nd accused preferred Crl.A.No.139/2001 before the Court of First Addl. Sessions Judge, Thiruvananthapuram. The appellate Court on hearing the appeal confirmed the conviction entered against the appellant and the 2nd accused for the offence under section 55(a) of the Abkari Act and modified the sentence to undergo rigorous imprisonment for a term of one year each and to pay fine of Rs.1,00,000/- each and in default to undergo rigorous imprisonment for six months each. Since Crl.A.No.139/2001 had been filed against the judgment of the trial court, this appeal is treated as revision filed under section 401 Cr.P.C.

2. As the revision is filed through the jail authorities, a member of the State Brief Panel has been appointed to defend the case of the petitioner.

3. The learned counsel for the petitioner contends that both the courts below have committed serious error in relying on the evidence of the prosecution witnesses to find the petitioner guilty of the charge. Secondly, It is contended that the police officials who detected the crime have not

complied with the provisions of section 36 of the the Abkari Act and the provisions of the Kerala Excise Manual. Thirdly, it is contended that the sentence awarded against the petitioner is excessive.

4. This Court heard the learned counsel for the petitioner and learned Public Prosecutor.

5. The prosecution mainly relied on the evidence of PW1, PW2 and PW4 to prove the case against the petitioner. PW1 is an independent witness and an attester of Ext.P2 mahazar. PW2 who was a Police Constable of Fort Police Station was also an attestor of Ext.P2 mahazar. PW4 who detected the case stated that on 17-4-199 at 9.30 a.m. while he was on law and order duty along with two police constables and when they reached near Killipalam Junction, he saw the petitioner and 2nd accused standing there in a suspicious circumstances and on seeing the police party they tried to ran away from the place, but they were detained. He also stated that on observation, it is revealed that both the petitioner and the 2nd accused were having one can and one bottle respectively in their hands and the can contained two litres of arrack and the bottle contained 750 ml. of arrack. He had stated that after preparing Ext.P2 mahazar the contraband articles were seized and sealed in the presence of independent witness. This witness further stated that after preparation of Ext.P2 mahazar, the

petitioner and the articles were produced before the police station and registered a crime. He also stated that thereafter F.I.R. was sent to the court and both the petitioner and the 2nd accused along with the articles were produced before the court. PW2 who accompanied PW4 stated that while they were on law and order duty and when they reached near Killipalam Junction, they saw the petitioner and the 2nd accused who were holding MO1 can and MO2 bottle respectively running from the place. He also stated that on examination, it was found that MO1 can contained 2 litres of arrack and MO2 bottle contained 750 ml. of arrack. PW1 was examined to prove Ext.P2 mahazar. He turned hostile to the prosecution. Though PW1 has not supported the prosecution case, his signature would show that he was present at the place of occurrence. Hence, the trial court is justified in accepting the evidence of PW2 and PW4 that the petitioner and the 2nd accused were found in possession of M01 can and MO2 bottle.

6. PW4 admitted his evidence that he had not taken any sample from MO1 and MO2. He also admitted that neither the petitioner nor the 2nd accused had signed Ext.P2 mahazar. It is to be noted that when PW4 was questioned about the seal, he stated that he was not in a position to say whether the seal found in MO1 and MO2 was put by him. There is no evidence to show that prior to the production of the contraband article the

article was kept in safe custody in the police station. In this context a decision reported in Dominic V. State of Kerala (1989(1) KLT 601) is relevant. In the above decision relying on paragraph 34 of Kerala Excise Manual held that seizure should be reported to the court forthwith and request made for sending a sample for analysis. Section 34 of the Excise Manual reads as follows:-

> "34. Contraband articles seized such as wash which may be, or are likely to become, so offensive as to be a nuisance need not be sent to the Range Office for safe custody. But if in any case an officer judges their retention to be necessary for production in court or for any other reasons, he must bury them or make such other arrangements for their safe custody as will not cause a nuisance. Generally speaking, such articles may safely be destroyed at once in the presence of the accused and the Inspector after taking samples of them. The accused may also be required to affix his seal to the samples. Three samples of not less than (1) 130 grams weights from each distinct kind of excisable drug and (2) two samples of such smaller quantity as may be available of each kind of liquor or wash, may be taken in the presence of the Excise Inspector or senior most Excise Officer present and the accused. Each set of these samples should then be sealed and marked with the same number or mark the particulars of which should be entered in the appropriate columns of the contraband register and in the occurrence report of the case. One sample of each set may be taken by the officer depositing it and two may be left with the officer in charge of the Range with the occurrence report of the case. If the articles are deposited by the Inspector or a member of the Range staff, all the 3 may be retained in the Range Office. One of these samples will then be available for the use of the officer in charge of the Range for analysis, if need be and the other for the Magistrate's inspection, if the case is prosecuted before a Magistrate."

Apart from the above, as per the provisions of the Kerala Chemico-Legal Examination Rules 1959, sample should have been sent for opinion of the Chemical Examiner and the Chemical Examiner shall, as far as practicable, furnish a quantitative analysis stating the result of the analysis which led to the conclusion in his report under section 293 of Cr.P.C. Rules 2 and 3 of the relevant rules read as follows:-

> 2.
> (a) In the transmission of articles to the Chemical Examiner to Government for analysis, three objects are to be mainly kept in view viz., the proof of identity, the impossibility of any interference during transit, and the preservation of the articles from decomposition.
>
> (b)The Chemical Examiner shall bring to the notice of Government every case in which these Rules are not strictly adhered to.
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> 3. In every case in which analysis is required for judicial purposes by the Police, Magistracy, or Excise Officers, the Chemical Examiner shall as far as practicable, furnish a quantitative analysis stating the results of the analysis which led to the conclusion in his report under section 293 of the code of criminal Procedure, 1973 the report being legal and a very clinching piece of evidence in any investigation, inquiry, trial or other proceedings under the Code.

From the evidence now adduced would show that no sample was taken from the contraband article. Clause (e) of Rule 17 of the above Rule says that "**Excise Officers shall forward articles seized under the provisions of**

**the Abkari Act in force through the Magistrates within whose jurisdiction the offence has been committed".** The above provision would indicate that the sample should have been sent for the opinion of the Chemical Examiner. In this context, the submission of the learned Public Prosecutor is that it is not necessary to take the sample by the officers and the sample can be sent for analysis through the court also. In a decision reported in Narayani V. Excise Inspector (2002(3) KLT 725, this Court held that in the absence of any evidence to prove that residue and sample were kept in the proper custody till the date of producing the same before the court, the chance of tampering with the sample taken and the residue seized could not be ruled out. The evidence of PW4 would show that he had not taken any sample from MO1 and MO2 and neither the petitioner nor the 2nd accused had signed Ext.P2 mahazar. The case set up by the petitioner is that the police had foisted the case against the petitioner. The non-compliance of the duty cast on the officer coupled with the case set up by the petitioner, this Court is of the view that the prosecution has failed to to prove the case against the petitioner. That apart it has come out in evidence that three samples were sent for analysis and two of them alleged to have been taken from MO1 and MO2. There is no evidence to show that whether the samples were sent by the court or not. As per section 53 of the Abkari Act,

the officers in charge of police station shall take charge of and keep in safe custody all articles seized under the Abkari Act and take samples from them. The above provision would also clear that the officers who detects the crimes under the Abkari Act shall take sample for analysis. In the above circumstances, the contention that the officers have not complied with the provisions of the Abkari Act and the Kerala Excise Manual is sustainable. In the above circumstances, this Court is of the view that the prosecution has failed to prove the case against the petitioner beyond reasonable doubt. Hence, the findings of the trial court and the appellate court are liable to be set aside.

7. Hence, the conviction and sentence awarded against the petitioner/1st accused in S.C.No.454/2000 on the file of the Court of the Addl. Asst. Sessions Judge, Thiruvananthapuram are set aside and the petitioner is acquitted. Therefore, the petitioner shall be released forthwith unless required in any other case.

The revision is allowed as above.

K. Thankappan,
Judge.

**K. Thankappan,J.**

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**Crl.A. No. 1379/2006**

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**Judgment**
**9-1-2007**